

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

GEOFFREY CROWTHER,
Plaintiff,

v.

CSX TRANSPORTATION, INC. and
CONSOLIDATED RAIL CORP.,
Defendant

AND

GEOFFREY CROWTHER,
Plaintiff,

v.

CSX TRANSPORTATION, INC.

3:09-cv-10334-MAP

3:09-cv-11467-MAP

**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION IN LIMINE FOR LEAVE
TO INTRODUCE EVIDENCE OF PLAINTIFF'S RECEIPT OF RAILROAD
RETIREMENT BOARD BENEFITS**

Defendants CSX Transportation, Inc. ("CSXT") and Consolidated Rail Corporation ("Conrail") submit this brief Reply in support of their Motion in Limine for Leave to Introduce Evidence of Plaintiff's Receipt of Railroad Retirement Board ("RRB") Benefits. In further support of this Reply, Defendants state as follows:

Defendants seek to introduce evidence of Plaintiff's receipt of RRB benefits in support of their argument that Plaintiff is malingering and has failed to mitigate his damages. Defendants do not intend to reiterate their argument in support of their request to introduce evidence of Plaintiff's RRB benefits. Instead, Defendants must bring to this Honorable Court's attention a dispositive fact which Plaintiff's counsel admitted at a recent deposition, that is, that the sole reason Plaintiff has not returned to work in any capacity, despite his ability to do so, is because

he is receiving disability benefits. Indeed, the following exchanges occurred at Dr. Martin Luber's trial deposition on December 1, 2010:

Attorney Joyce: I will represent that he can't work on the railroad anymore. But I think the opinions that I have gotten in the three days that we have done these depositions indicate that he has some capacity to work.

Attorney Joyce: He hasn't gone back to work and there's a reason. You know what the reason is, which is something that is not -- which is not relevant for the purposes of the jury.

Attorney Flynn: I don't know what the reasons are.

Attorney Joyce: You do know what the reasons are.

Attorney Flynn: Oh, because he's getting money?

Attorney Joyce: Because he's on a disability, okay, which is not something the jury is going to hear because it's a collateral source.

Attorney Joyce: There's a reason that the judge will be aware of and is aware of that he is not working is because -- and this is not for the purposes of the jury and I will not waive that right -- is that he is on a disability which prevents him from working.

Attorney Flynn: If you're going to make that an issue, then you've got to make it an issue.

Attorney Joyce: That's not an issue. What I am telling you for purposes of the judge and to stop this harassment of my doctor is **the reason he is not working is because he is on a disability annuity that he's earned for 31 plus years of working the railroad. That's why he is not working okay.**

(Dep. of Martin J. Luber dated Dec. 1, 2010 at 93-94, 98, relevant portions of which are attached as Exhibit A.)

It is, therefore, absolutely undisputed that Plaintiff's lack of motivation to return to work (and failure to meet his affirmative duty to mitigate his damages) is because he is receiving disability benefits. This is clearly dispositive evidence of malingering. Based on this admission,

at a minimum, Defendants must be allowed to introduce evidence that Plaintiff is receiving disability benefits to show that Plaintiff is malingering and why he has failed to mitigate his damages. Alternatively, Defendants respectfully request that this Honorable Court find, as a matter of law, and instruct the jury accordingly, that Plaintiff: (1) is malingering; and (2) has breached his duty to mitigate his damages.

WHEREFORE, for all the above-stated reasons, Defendants' Motion should be **ALLOWED**.

Respectfully submitted,
CSX Transportation, Inc.,
by its attorneys,

/s/ Heather M. Gamache
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Dated: December 9, 2010

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CERTIFICATE OF SERVICE

I, Heather M. Gamache, attorney for Defendants hereby certify that I have served true and correct copies of the foregoing Memorandum of Law upon all counsel of record electronically via *CM/ECF* this 9th day of December, 2010.

/s/ Heather M. Gamache
Heather M. Gamache, Esq.